IN THE

Supreme Court of the United States

October Term, 1972.

No. 71-1367.

ROCKWELL-STANDARD CORPORATION,
Petitioner,

v.

SCAIFE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION AND APPENDIX.

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OPINION BELOW.

The Opinion of the Supreme Court of Pennsylvania is reported at 446 Pa. 280, 285 A. 2d 451.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

When, pursuant to its long-standing and well-known procedure for review of a trial court's ruling that a jury's verdict is excessive, the highest court of a State determines, after review of the record, that the jury's verdict was supported by the evidence and orders reinstatement of that verdict, has the defendant been denied due process of law?

STATUTE INVOLVED.

The pertinent provision of the United States Constitution is set forth in the Petition.

STATEMENT OF THE CASE.

The procedural history of Scaife Company's appeal is adequately set forth in the Petition. Response to petitioner's argumentative characterization, at page 5 of the Petition, of the Pennsylvania Supreme Court's decision appears at Sections 1 and 3, *infra*. Response to petitioner's contention at page 5 of the Petition that its federal due process claim was timely raised below appears at Section 2, *infra*.

REASONS FOR DENYING THE WRIT.

1. There Are No Special or Important Reasons for Granting the Writ.

A properly instructed jury, which had ample opportunity to assess the credibility of every witness whose testimony related to damages, found that petitioner's fraudulent misrepresentations in the course of selling a business to respondent caused economic damage to respondent in the amount of $1,200,000.28. After concluding without explanation that the damages found by the jury were excessive, the trial court *en banc* ordered a new trial on damages unless respondent accepted a substantial reduction in the damages found by the jury.

When respondent appealed from that order, the Pennsylvania Supreme Court was forced to review the entire record because the lower court had not elaborated its reasons for concluding that the jury's findings were wrong. The Pennsylvania Supreme Court did so, and held:

> "It is our opinion that the jury's verdict is fully supported by the evidence and should be reinstated." (App., *Petition*, p. 45a).

In order to avoid the necessity of reviewing an entire record in future cases, the Court also instructed lower courts that in the future they should explain fully why they believe a jury's verdict is excessive (App., *Petition*, pp. 42a-43a).

Petitioner now contends that the Pennsylvania Supreme Court denied it due process because it did not remand the instant case to the lower court for such an explanation. But the Pennsylvania Supreme Court is the final judge of the sufficiency of evidence pertaining to damages. It has already reviewed the record and found that the evidence fully supported the jury's verdict. To require

that this case be remanded to the court *en banc* for an explanation, and that the record then be returned to the Pennsylvania Supreme Court for another review of the record, would sanction an exercise in futility not required by the principles of due process.

Furthermore, the Pennsylvania Supreme Court's decision was made in an action which involves only the determination of the instant parties' rights under Pennsylvania common law principles governing a defendant's liability for fraudulent misrepresentations made in the sale of a business. The order requiring reinstatement of the verdict was one of a number of similar orders by which the Pennsylvania Supreme Court has enforced Pennsylvania rules setting forth the proper roles of judge and jury in trials in its courts. E.g., *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482 (1959).

The Pennsylvania Supreme Court's decision rested solely on matters of state law. That Court construed no federal statute and ruled on no other federal claims. In short, there is no special and important reason that that Court's decision should be reviewed by this Court, and the Writ should therefore be denied. See, e.g., Rule 19(1)(a) of the Supreme Court Rules.

2. The Question Was Not Timely Raised Below.

In its appeal from the trial court's determination that the jury's verdict was excessive and from its award of a new trial on the question of damages, Scaife Company clearly and unequivocally requested the Pennsylvania Supreme Court "to reinstate the verdict of the jury", and cited in its Brief as Appellant the Pennsylvania authorities in support of that relief. (App., *Brief in Opposition*, 1a-6a.) The question whether such relief would violate the principles of due process thus became an issue

at the outset of the proceedings on Scaife Company's appeal.

Furthermore, the relief requested was not novel: Scaife Company simply asked the Pennsylvania Supreme Court to follow its standard procedure for correcting a trial court's erroneous cancellation of a jury's verdict on the ground that it is excessive.

Petitioner thus had ample warning that if the Pennsylvania Supreme Court decided that the trial court had erred in finding the jury's verdict excessive, the apropriate relief would be to order reinstatement of the jury's verdict. It had ample opportunity to raise its claim that such relief would violate due process in the Briefs and Oral Argument it submitted to the Pennsylvania Supreme Court as Appellee. Nonetheless, petitioner did not raise its due process claim until after the Pennsylvania Supreme Court had granted Scaife Company the relief requested.

By virtue of its decision to defer presenting its due process claim until after the Pennsylvania Supreme Court had decided Scaife Company's appeal, petitioner failed to preserve that point for review by this Court, and the Writ should be denied. *Hanson v. Denckla*, 357 U. S. 235, 243-244 (1958); *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 128 (1945); *Herndon v. Georgia*, 295 U. S. 441 (1935); *American Surety Co. v. Baldwin*, 287 U. S. 156, 162-164 (1937).

Moreover, in its Petition for Reargument to the Pennsylvania Supreme Court petitioner merely asserted that reinstatement of the jury's verdict by that Court "must be considered violative of the Due Process Clause" (App., *Petition*, p. 52a). By failing to specify whether its claim was based on the Due Process Clause of the Fourteenth Amendment to the United States Constitution or on the Due Process Clause of the Constitution of the Commonwealth of Pennsylvania (Art. I, Section 9, Pennsylvania

Constitution),[1] petitioner failed to present adequately to the Pennsylvania Supreme Court the federal due process claim it attempts to raise now. For this reason alone the Writ should be denied. *Bowe v. Scott*, 233 U. S. 658, 664-665 (1914).

3. The Decision Below Is Clearly Correct.

It is true, as petitioner urges, that in common with the federal system Pennsylvania law grants its trial judges the power to set aside or reduce a jury's verdict on grounds that it is excessive. But it has long been clear that in civil actions to enforce claims arising solely under state law, the United States Constitution permits a state to limit or even to eliminate altogether its trial judges' powers over a jury's decision. E.g., *Chicago, Rock Island & Pacific Railway Company v. Cole*, 251 U. S. 54 (1919). See, e.g., *Herron v. Southern Pacific Company*, 283 U. S. 91, 93 (1931).[2]

In Pennsylvania, the circumstances under which a trial judge may set aside or reduce a jury's verdict are narrowly circumscribed. And when the trial court interferes with a jury's verdict in the absence of those circumstances, his decision is subject to review and correction by the Pennsylvania Supreme Court. E.g., *Beal v. Reading Company*, 370 Pa. 45, 49 (1952). In the instant case the Pennsylvania Supreme Court, after reviewing the record, found that the jury's verdict was fully supported by the evidence, and that none of the conditions which under Pennsylvania law

1. See, *Craig v. Kline*, 65 Pa. 399, 413 (1870).

2. For this reason, none of the cases cited by petitioner in Section 1 of its Petition support granting the Writ. In each of the cases cited by petitioner this Court was either discussing the powers of federal judges over a jury's decision or determining the appropriate role of state judges in actions to enforce claims arising under federal statutes.

authorize interference with a jury's verdict were present. Accordingly, it ordered reinstatement of the verdict. In so doing it simply followed its well known procedure for disposing of such a case.

As had been stated by the Pennsylvania Supreme Court many times prior to its decision in the instant case, when the trial court's cancellation of a jury's verdict is challenged on appeal, the Pennsylvania Supreme Court must "review the record to determine whether the cancellation of a jury's verdict is warranted under all the circumstances of the case." *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 488 (1959). After such review, if the Supreme Court determines that cancellation of the jury's verdict was unwarranted, the appropriate disposition is to remand with instructions to reinstate the jury's verdict. E.g., *Spangler v. Helm's New York-Pittsburgh Motor Express, supra; Hilliard v. Anderson*, 440 Pa. 625 (1970).

In the present case the Pennsylvania Supreme Court, after review of the record, determined that the jury's verdict was well within the amount of damages established by evidence of the economic effects of the petitioner's fraud. This was obviously a decision within the competence and power of that Court.[3] That Court's order requiring rein-

3. Every case on which petitioner bases its assertion to the contrary arose in circumstances far different than those presented here. The Pennsylvania Supreme Court was not, for example reviewing the unexplained decision of a Federal Administrative agency charged with the interpretation and application of a Federal Statute. Nor was it reviewing the decision of a lower Federal Court applying a Federal Statute in which the stated ground for decision was held by the United States Supreme Court to be an erroneous application of the statute. Under such circumstances, as the cases on which Petitioner relies make clear, this Court will frequently remand such a decision to the pertinent Federal agency for explanation of its challenged decision. *Secretary of Agriculture v. United States*, 347 U. S. 645 (1954); *National Labor Relations Board v. Metropolitan Life Insurance Co.*, 380 U. S. 438 (1965); *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156 (1962). Or it will remand to the lower Court for further proceedings applying the statute as inter-

statement of the verdict, returned by a properly instructed jury which had ample opportunity to weigh any credibility problems even arguably presented by the evidence pertaining to damages, in no way violates the principles of the Due Process Clause of the Federal Constitution.

CONCLUSION.

For the foregoing reasons respondent, Scaife Company, respectfully requests that the Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania be denied.

Respectfully submitted,

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3. (Cont'd.)

preted by this Court. *Chaunt v. United States*, 364 U. S. 350 (1960); *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co.*, 382 U. S. 423 (1966). Actually, these decisions are not based on the requirements of the Due Process Clause of the United States Constitution. They are, instead, based on this Court's role in enforcing the administrative and judicial procedures established by Congress for the application of federal statutory policies.

Certificate of Service.

I hereby certify that on this 25th day of May, 1972, three copies of the Brief of Respondent in Opposition and Appendix were mailed, postage prepaid, to Gilbert J. Helwig, Reed, Smith, Shaw & McClay, Union Trust Building, Pittsburgh, Pennsylvania 15230, Counsel for Petitioner. I further certify that all parties required to be served have been served.

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May 25, 1972

Appendix.

EXCERPT FROM BRIEF OF APPELLANT, SCAIFE COMPANY, IN THE SUPREME COURT OF PENNSYLVANIA.

* * *

C. The Lower Court's Substitution of Its Opinion of the Damage Suffered by Scaife for That of the Jury Without Any Explanation and Its Order That the Plaintiff Re-litigate the Question of Damages Unless Plaintiff Accept a Reduction of That Verdict Was Arbitrary and a Clear Abuse of Discretion.

The court *en banc* after a careful analysis of the trial judge's charge ruled that he correctly instructed the jury about every element of damages recoverable by Scaife (1504a-1508, *Opinion*). The court ruled further that the formula the jury was instructed to apply was a correct statement of the damages recoverable by a victim of fraud. Included in the trial judge's formula, and expressly approved by the lower court, were: (1) the amount paid for equipment and inventory transferred less actual value; (1506a, *Opinion*) (2) the loss caused by the effect of the defective gas furnace on the reputation and sales of the Timken Silent Automatic product line; (1506a, *Opinion*) (3) the amounts expended by Scaife in its efforts to correct the defect and to reduce or reverse the losses caused by the defect; (1507a, *Opinion*) (4) interest upon such part of the claim as the jury found was certain, to be calculated from the time the amount awarded was judged by the jury to have been a sum certain (1508a, *Opinion*).

The lower court further acknowledged that because the amount of damages were not capable of determination with "mathematical exactness", the final decision on these elements was a matter for the jury (1506a-1507a, *Opinion*). Parenthetically, it is important to note that in this case the jury was given precise figures setting out clearly the outer limits of damages flowing from Rockwell's fraud. The jury was not required to construct from whole cloth a value for such intangible damages to a plaintiff as "pain and suffering." The jury here was given both dollar amounts and testimony and documentary evidence establishing the basis on which the jury could determine that some, and even all, the dollars lost were the direct result of Rockwell's fraud. That the jury conscientiously (and conservatively) applied the formula given by the judge to the evidence submitted to it is apparent. Its damages verdict, $810,811.00, is well within the maximum amount of loss proved by plaintiff: $1,738,203.00. That was the amount of the operating losses suffered by plaintiff in operating the Division during the period it was attempting to market the Division's product line and to correct the defective gas furnaces.

Against this background, the action of the lower court in setting aside the jury's verdict and requiring relitigation of damages cannot be sustained. The court did not explain in what respect it felt the jury's verdict was defective. While trial courts are allowed significant powers and discretion by this court, their discretion is not unlimited. The lower court's failure to explain in what way or ways it felt the jury's verdict to be unsatisfactory alone violated the clear mandate of this court. *Bellettiere v. Philadelphia*, 367 Pa. 638,

644 (1951); *Beal v. Reading Company*, 370 Pa. 45, 49 (1952). The lower court's failure to specify how the jury's verdict was wrong imposes on this court the duty "to review the record to determine whether the cancellation of a jury's verdict is warranted under all the circumstances of this case." *Spangler v. Helms New York—Pittsburgh Motor Express*, 396 Pa. 482, 487-488 (1959). In *Spangler*, this Court reversed the trial court's grant of a new trial because of an excessive verdict and ruled that the jury's verdict was not, in fact, excessive.

Having ruled that no error was made in the admission of evidence justifying an award of $1,738,203, there was no basis for the court's statement that "it is conceivable that plaintiff suffered a legally compensable harm in excess of the verdict but it has failed to produce competent evidence to prove this." (1508a *Opinion*) The court's subsequent statement that "[b]ased on the record which we have before us we are of the opinion that the jury's verdict is excessive" (1508a, *Opinion*), is not explained by it, and finds no support from the record.

By overturning the jury's verdict without explanation the court in effect was acting as a jury. In so doing, it plainly abused its powers as a court *en banc*, whose function is to correct errors in the conduct of a trial. This court's recent analysis of its role on review is equally applicable to the role of the trial court:

> "It is not the function of an appellate court to pass upon the credibility of witnesses or to act as the trier of facts, and we will not substitute our judgment for that of the fact-finding jury, if there

> is sufficient evidence of record to support the jury's findings of fact [Citations]. Even though we might be of the opinion that had we been the trier of fact we would have reached a contrary result, nevertheless, we will not set aside the findings of fact of a jury implicit in its verdict which are evidentiarily supported of record and where there was no abuse of discretion and where no error of law has been committed [Citations]." *Burbage v. Boiler Engineering & Supply Company, Inc.*, 433 Pa. 319, 323-324 (1965) [Affirming denial of new trial.]

Of course, a trial court has both the power and the duty to revise verdicts so clearly excessive that the jury must have been swayed by "passion, partiality, prejudice or corruption." See, *e.g.*, *Amey v. Erb*, 296 Pa. 561, 567 (1929). But in the instant case, the lower court did not and could not find such a basis for the jury's verdict. The wrong done Scaife was an economic wrong, the damages measurable by non-emotive economic effects proved by substantial competent evidence.

A trial court also must correct verdicts excessive because the jury was improperly instructed as to the measure of damages and may effect such correction by reducing the verdict by the excess awarded pursuant to the erroneous portion of the charge: *Skoda v. West Penn Power Company*, 411 Pa. 323, 333-338 (1963). Or it may, on this ground, require re-litigation of the question of damages. *Tilghman v. Dollenberg*, 418 Pa. 604 (1965) [Claim based on fraud, affirming award of a new trial on damages because of improper jury charge on the measuring of damages]; *Hahn v. An-*

drews, 182 Pa. Super. 338 (1956) [Breach of contract, ordering re-litigation of damages question because trial court erroneously excluded evidence relating to lost profits.]. But the lower court expressly did not and indeed, could not base its decision on this ground.

It is also clear that when the measure of damages can be stated with precision to the jury and when the evidence clearly establishes the maximum amount which plaintiff can be entitled to recover, the trial court may revise a verdict obviously in excess of the maximum so established, and for that reason manifestly against the weight of the evidence. *Swartz v. Smokowitz*, 400 Pa. 109, 112 (1960) [Affirming new trial on damages in wrongful death and survival action]; See, *Eisert v. Jones*, 408 Pa. 3, 78 (1962) [Denial of new trial affirmed because, inter alia, record did not disclose "capricious disregard by the jury of persuasive testimony."]. But this power is necessarily very narrowly circumscribed and cannot be exercised unless the verdict is so out of proportion to the amount proved that it is apparent that the jury misconceived the law or the evidence. *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482 (1959) [Reversing grant of new trial based on exeessiveness of the verdict.]

Since none of the conditions authorizing a court to revise a jury's verdict and to require re-litigation of damages have been met in the instant case, the lower court's award of a new trial on damages was erroneous and must be reversed.

VI. CONCLUSION.

For the foregoing reasons, Scaife Company respectfully requests this Honorable Court to reverse the Lower Court's grant of a new trial on the question of damages and to reinstate the verdict of the jury.

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